Supreme Court, U.S.
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No. 03-935

In the
SUPREME COURT OF THE UNITED STATES

State of North Dakota and
State of South Dakota
Petitioners,

v.

Lt. Col. K.F. Ubbelohde, Dist. Engineer, Omaha Dist., U.S. Army Corps of Engineers; Brig. Gen. W.T. Grisoli, Commander, NW Div., Portland, Or., U.S. Army Corps of Engineers; State of Missouri; and the State of Nebraska; et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Missouri River Master Water Control Manual, promulgated under the Flood Control Act of 1944, Pub.L. No. 78-534, 58 Stat. 887 (1944), is binding on the U.S. Army Corps of Engineers.

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INTRODUCTION AND STATEMENT

Missouri and petitioners North and South Dakota ("the Dakotas") have very different views of the Flood Control Act of 1944 and the substantive meaning of the Missouri River Master Water Control Manual ("Master Manual"), the longstanding rule that sets out the manner in which the United States Army Corps of Engineers ("Corps") is to manage the water system that a series of dams created from the formerly free-flowing Missouri River. The views are largely the result of the dramatically different approaches that Dakota and Missouri citizens have taken to life on the River.

In Missouri, agriculture has flourished along the River. Farmers rely on the dams to prevent flooding of their land and to provide the continuous flows that make it possible to transport bulk materials– including fertilizers and crops–inexpensively. Farmers and shippers make long-term investments premised on the Master Manual, published by the Corps to satisfy the congressional mandate embodied in the Flood Control Act. Each year, in late winter, shippers, warehousemen, and navigators enter into contracts for the delivery of goods on the Missouri River–contracts that necessarily depend on the river flows promised by the Master Manual.

While farming has flourished in Missouri, under the management of the Corps and pursuant to the Master Manual a recreation industry has flourished in the upstream states. Instead of corn and soybeans, the product is tourism revenue, produced in part by fishing

for walleye, a nonnative game fish that feeds on a small forage fish, the rainbow smelt. The smelt spawns in water only inches deep along the shores of the big lakes. The Dakotas tell this Court that the fate of their multimillion dollar recreation industry hinges on this tiny minnow. But like Missouri farmers, those establishing businesses based on walleye fishing in the Dakotas proceed with full knowledge of the Master Manual and the manner in which it requires the Corps to manage the river. And despite their difficulties in 2003, the Dakota businesses have obviously thrived under the Master Manual regime.

This case is one of several in which the interests of the Dakotas and Missouri regarding the Missouri River collide. Those collisions occur as the Corps decides, each year, how (or, but for the decision of the Eighth Circuit here, whether) to implement the criteria established in the Master Manual. Each year, the Corps prepares an Annual Operating Plan to tell river users how it will meet the requirements of the Master Manual, setting out the likely hydrological conditions and how they will affect River management in the next twelve months.

One feature of the Annual Operating Plans is "unbalancing." Unbalancing is the Corps' practice of drawing down one of the three large reservoirs each spring, so that the others may rise and thereby enhance fish spawning success. This well-established practice accommodates, on a rotating basis, the up-stream states' desires for a healthy fish spawn, while ensuring continuous downstream flows.

Pursuant to the Master Manual and the Annual Operating Plan, in 2002 Lake Oahe in South Dakota was scheduled for its routine "unbalancing" drawdown. On April 25, 2002, the State of South Dakota filed suit in the U.S. District Court for South Dakota to stop that process. That court refused to allow the State of Nebraska to intervene or the State of Missouri to appear even as an amicus.[1] The court issued a temporary restraining order prohibiting the Corps from drawing down Lake Oahe.

The Corps turned to Lake Sakakawea in North Dakota to provide the downstream flow required under the Master Manual. On May 12, 2002, the State of North Dakota filed suit in the District of North Dakota and obtained its own restraining order protecting Lake Sakakawea.

The Corps then necessarily looked upstream to Fort Peck Lake in Montana. Predictably, Montana filed suit and duly obtained its own order.[2]

Meanwhile, Nebraska and Missouri, frustrated in their efforts to enter the South Dakota case, filed their own suit in the District of Nebraska. But their claims were remarkably different than the ones pursued in the upstream states. Rather than seek

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[1]The Dakotas appear to concede these errors; in their petition, they do not contest the Court of Appeals decision on the intervention claims.

[2]Montana voluntarily dismissed its action after the Fort Peck spawning season.

relief *from* the Master Manual, as South and North Dakota had done, Nebraska and Missouri sought to *enforce* the Master Manual. The district court agreed, ordering the Corps to operate the Missouri River mainstem reservoirs in accordance with the Master Manual and the Annual Operating Plan so as to provide sufficient releases to maintain navigation and other downstream uses. Despite the district court's order, navigation was severely disrupted at great expense throughout 2003.

The Nebraska, South Dakota, and North Dakota decisions were all appealed to the U.S. Court of Appeals for the Eighth Circuit. On June 4, 2003, the court of appeals affirmed the Nebraska injunction and reversed the South Dakota and North Dakota injunctions. *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) (Petition Appendix (App.) at 1). The court of appeals held that downstream states are entitled to intervene as a matter of right in Missouri River litigation, that the Corps' reservoir operation decisions are subject to judicial review, and that the 25-year-old Master Manual is a binding rule that, until a new manual is promulgated, constrains the Corps' discretion. 330 F.3d at 1033; App. 32-34. The court of appeals denied rehearing on September 30, 2003.

REASONS TO DENY THE WRIT

The question posed by the Dakotas is whether the Eighth Circuit correctly held, consistent with this Court's decision in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), that flood control and navigation are the "dominant functions" of the Missouri River

reservoirs, and that those congressional project purposes are entitled to preferential treatment over recreation, a subordinate and ancillary project purpose, in the management of the Missouri River under the Flood Control Act of 1944. Notably, Petitioners do not make a serious attempt to find a conflict between the decision of the Eighth Circuit and any decision by this or any lower court. Nor is a conflict likely.

But equally important, the Dakotas pose the wrong question. They argue the case as if the Flood Control Act itself told the Corps just how to accommodate the different demands for Missouri River water, though they expressly say it did not. They fail to take into account the key role of the Master Manual, both in management of the River and in the court of appeals' decision. The Flood Control Act set out a list of purposes, but it left the balancing largely to the Corps of Engineers. The Corps adopted the Master Manual to set out how it would perform that task, then issued Annual Operating Plans to deal with year-to-year changes in hydrology. Despite Petitioner's belated objection, the court of appeals' decision to require the Corps to adhere to the 25-year-old Master Manual is an unremarkable application of established law that does not merit consideration by this Court.

1. Missing from the petition is the suggestion of any conflict between the decision of the Eighth Circuit and any decision of this Court. Indeed, the petition itself distinguishes this case from the only two in which this Court has addressed the 1944 Flood Control Act, *South Dakota v. Bourland*, 508 U.S. 679 (1993),

and *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). *See* Petition at 26.

The petition makes no attempt to find a conflict among circuit court decisions. Indeed, there is none. No circuit other than the Eighth has addressed the setting of priorities under the Flood Control Act. Nor has any other circuit addressed the significance or meaning of the Master Manual.

Indeed, no other court is likely to address either question. Missouri and the Dakotas have, and will likely continue to have, their differences. But Missouri and the Dakotas are within the Eighth Circuit. Moreover, the pending multi-district litigation over the management of the Missouri River System is assigned to a district judge in the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F.Supp.2d 1378 (J.P.M.L. 2003). As the Judicial Panel on Multidistrict Litigation wisely recognized by consolidating Missouri River litigation in Minnesota, the Eighth Circuit is the only sensible federal appellate forum for resolving Missouri River disputes. Moreover, because it hears appeals from the district courts in all of these states, the Eighth Circuit, not another circuit, will have the opportunity to address in other, future contexts questions regarding the Flood Control Act and the Master Manual.

In the event that some other circuit eventually takes up the management of the Missouri River and disagrees with the Eighth Circuit, then the Dakotas or another party may seek a writ of certiorari. But until that time, this Court need not take up Missouri River

management questions merely because the River crosses state and circuit lines.

2. The court of appeals held that the Corps' operation of the Missouri River System is subject to judicial review and that the Master Manual is a rule that binds the Corps in managing the waters of the Missouri River. App. 21. In their petition, the Dakotas do not challenge this holding. Instead, they myopically focus on one aspect of the court of appeals opinion.

The Dakotas say that the court of appeals' "critical conclusion" was its determination "that the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation." Petition at 25. Even if this conclusion was set aside, however, the result would not change. The Master Manual – which favors navigation and flood control over recreation – would still be a binding rule constraining the Corps' discretion. The court of appeals concluded that "the Corps' decision to adopt this prioritization [in the Master Manual] was not impermissible." App. 32.

Still assuming that Congress did not assign relative priorities among conflicting uses in the Flood Control Act, the Dakotas point to nothing that suggests the court of appeals was wrong in leaving the balancing of competing interests to the Corps. To use the language of the Dakotas' petition, the Corps was assigned to manage reservoirs "as multi-purpose facilities, serving a number of interests, and with flexibility that adjusts to the basin's changing circumstances." Petition at 14. The Corps was to do so using its own judgment and expertise, for even in the

Dakotas' view, the Act itself is "silent about priorities." Petition at 21.

The State of Missouri does not concede, of course, that the Dakotas are right, and all uses of the River must be treated equally. Besides being impractical or impossible, that approach ignores the overall structure of the Flood Control Act.[3] The Act gave the Corps power over projects the dominant functions of which were flood control and navigation. Projects for which the dominant functions would be irrigation or power production would be built and operated by the Department of Interior. On this point, both Interior and the Corps were in complete agreement. See *ETSI Pipeline*, 484 U.S. at 512, n. 6-7. Of course, both Lake Oahe (as noted by the Court in *ETSI Pipeline*) and Lake Sakakawea are controlled by the Corps – not Interior. Consequently, it is obvious that the "dominant functions" of those projects – along with Fort Peck, Fort Randall, Big Bend, and Gavins Point Dams – are flood control and navigation. That is confirmed by the declaration of policy of the 1944 Act, where Congress explained why it was authorizing the building of these dams:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of

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[3]There is no resort to legislative history, the principle crutch on which the Dakotas lean, when the statutory language is clear as in this instance. *See Blum v. Stenson*, 456 U.S. 886, 896 (1984).

> improvement, for navigation or flood control, as herein authorized . . . .

33 U.S.C. § 701-1 (1944)(emphasis added).

The Dakotas' desperation is so great that they note that Congress expressly assigned responsibility to the Corps, then accuse the court of appeals of "entrusting the Missouri River Basin's cultural, political, social and economic development to the military." Petition at 15. That is a rhetorical mischaracterization of the court of appeals' opinion. First, the court's interpretation of the Flood Control Act has nothing to do with the cultural, political, or social development of the basin. It has to do with the words Congress used to describe the way water was to be managed in the reservoir system. Second, the court did not "entrust" anything to "the military." Congress had long ago made that assignment. Indeed, the court of appeals construed that assignment narrowly: it held that the Corps' actions were subject to judicial review rather than committed to agency discretion by law, as the Corps argued. Moreover, the Corps is devoted primarily to civil works and is expressly controlled by appointed civilians rather than commissioned officers. It is not as if the Court of Appeals declared martial law when it decided this mundane question of statutory construction.

The Dakotas' real complaint – since they are seeking to protect a recreation industry based on a fish introduced only after the reservoirs were completed – must be that the Corps does not manage the reservoirs to meet what they perceive to be the contemporary

needs of the basin.[4] If that is a valid criticism (and the State of Missouri does not suggest that it is), it is a criticism to be taken into account by the Corps as it prepares a new Master Manual – *i.e.*, as it reconsiders the manner in which it should balance the competing interests served by the Flood Control Act.

The Courts cannot resolve the contemporary political contest between recreation and navigation – a contest that is being fought in Congress.[5] What the court of appeals decided was a question of law. The court of appeals could decide the case without further factual development because the critical facts – those regarding the content and issuance of the Master Manual – were undisputed.

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[4]With their "contemporary needs" argument, the Dakotas beg for judicial activism of the highest order. Unsatisfied by the law Congress enacted, or the execution of it by the agency, they instead expect this Court to determine the basin's "contemporary needs" and rewrite the law to fit them. If the "contemporary needs" of the basin have changed so as to change the requirements that should be imposed on the Corps, Congress will tell us. It has not.

[5]*See, e.g.*, Missouri Senator Kit Bond Statement on USFWS Missouri River Decision, http://bond.senate.gov/press_sec-tion/record.cfm?id=216842 (viewed Jan. 28, 2004), and North Dakota Senator Byron Dorgan Says Politics Prevail Over Science In Revised 'Opinion' On Missouri River Management, http://www.senate.gov/~dorgan/newsroom/record.cfm?id216763 (viewed Jan. 28, 2004).

Were it appropriate to reach the facts, Missouri would dispute the Dakotas' assertions about the relative value of recreation and navigation, or the specific dollar values speculatively assigned to these interests, particularly insofar as they rely on documents that are not part of the record below.[6] But the procedural posture of this case is such that the factual development of the epic struggle between good and evil described by the Dakotas is not yet ripe. The United States appealed each preliminary injunction promptly, without the kind of factual development necessary to decide such a fact-intensive and opinion-laden inquiry. The court of appeals decided the case without the benefit of even a single motion for summary judgment or the record that would normally be associated with material factual disputes.

As the court of appeals held, the Corps is authorized to balance the equities through the Annual Operating Plan process, so long as it follows the Master Manual and the Flood Control Act when it does so. The Corps can promulgate a new manual. Congress can amend the Flood Control Act. But in the interim, the Corps must abide by the Master Manual and the existing Act. Again, that holding is a routine appli-

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[6]For example, petitioners cite to an article by a well-known opponent of navigation, Dr. Phillip Baumel. The Baumel and Van Der Kamp piece was not published until July 2003, well after the court of appeals issued its opinion. Petition at 7 and 25. The Dakotas appear to rely on the text for extra-record factual development. This further demonstrates that the record below is not adequately developed to allocate the River's waters as explained *supra*.

cation of administrative law that does not merit review by this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the writ.

Respectfully submitted,

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